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SUPREME COURT, U.S.

No. 05-705

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 47 U.S.C. § 201(b) of the Communications Act of 1934 creates a private right of action for a provider of payphone services to sue a long distance carrier for alleged violations of the FCC's regulations concerning compensation for coinless payphone calls.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states: Global Crossing Telecommunications, Inc., is an indirect, wholly owned subsidiary of Global Crossing Limited, a Bermuda corporation. Global Crossing Limited, in turn, is more than 10 percent owned by STT Crossing, Ltd., a wholly owned subsidiary of Singapore Technologies Telemedia, Pte., a Singapore entity that is wholly owned by the Government of Singapore.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 423 F.3d 1056 (9th Cir. 2005), and is reproduced at Pet. App. 1a-39a. The relevant opinion of the district court is unpublished and is reproduced at Pet. App. 40a-58a.

JURISDICTION

The Ninth Circuit issued its opinion on September 8, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

47 U.S.C. § 201(a) provides: "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such routes."

47 U.S.C. § 201(b) provides in relevant part: "All charges, practices, classifications, or regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . . The Commission may prescribe such rules and regulations as may

be necessary in the public interest to carry out the provisions of this chapter."

47 U.S.C. § 206 provides in relevant part: "In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter . . . ."

47 U.S.C. § 207 provides in relevant part: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit for the recovery of the damages for which such common carrier shall be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction."

47 U.S.C. § 276(b)(1) provides in relevant part: "In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone . . . ."

The FCC's relevant payphone compensation regulations are set forth in the Addendum to this brief.

STATEMENT

This case concerns the ability of a party to bring a private cause of action based on alleged violations of certain FCC regulations, when the underlying statutory scheme, the

Communications Act of 1934, 48 Stat. 1064, provides that only *statutory* violations are remediable in federal court. The Ninth Circuit, disagreeing with a prior D.C. Circuit opinion, held that such a private cause of action does indeed exist. Failing to abide by FCC regulations, the Ninth Circuit reasoned, can also be conceptualized as violating the general prohibition in section 201(b) of the Act against certain "unjust or unreasonable" communications practices. The issue presented here is whether the Ninth Circuit's decision allows through the back door the sort of cause of action that Congress has barred from coming through the front.

1. Historically, payphone service providers often blocked callers' attempts to use access codes (such as 800 numbers or "10-10-220") to make "coinless" calls from payphones. These codes allow consumers to make payphone calls without placing any money in the phones by "dialing around" the payphone service providers' preselected (and usually high-priced) long distance carriers. In 1990, however, Congress passed a law requiring payphone service providers to allow consumers to make such coinless calls. *See* Telephone Consumer Services Improvement Act, Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226); 47 U.S.C. § 226(c)(1)(B). At the same time, Congress directed the FCC to consider whether payphone service providers should be compensated in some way for those "dial-around" calls. 47 U.S.C. § 226(e)(2). The FCC responded by deciding that long distance carriers that transmit such calls should compensate payphone service providers for some but not all of them. *See Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation*, 6 F.C.C.R. 4736, 4745-46 ¶¶ 34, 36 (1991), *recon.*, 7 F.C.C.R. 3251, 3259 ¶ 50 (1992). As a result, payphone service providers were not able to obtain any payment for a substantial portion of coinless calls.

Against this backdrop, Congress directed the FCC in the Telecommunications Act of 1996, Pub. L. No. 104-104, 100

Stat. 56, to create "a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s]." 47 U.S.C. § 276(b)(1)(A). After considering several alternatives – most notably, mulling over whether callers themselves or their long distance carriers should compensate payphone service providers for coinless calls – the FCC ultimately adopted what is sometimes called a "carrier pays" plan. Long distance carriers that carry coinless payphone calls must compensate payphone service providers each time their customers make such a call. *See* 47 C.F.R. §§ 64.1300-1340;[1] *Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 566-57 (D.C. Cir. 1997) (upholding this determination). The FCC recognized that callers, not carriers, are the "cost causers" when a coinless call is placed and that, as the "primary economic beneficiar[ies]" of the practice, the callers "should bear the burden of paying compensation for these calls." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 F.C.C.R 20,541, 20,586 ¶ 86 (1996) (hereinafter "*1996 Payphone Order*"). Nonetheless, the Commission elected to adopt the "carrier pays" system "in order to maintain the convenience of coinless calling upon which the public has come to rely." *Illinois Pub. Telecomm.*, 117 F.3d at 567. Long distance carriers can then "recover their own costs" by billing or contracting in advance with the callers. *1996 Payphone Order* at 20,584 ¶ 83.

The FCC's regulations specify a default compensation rate, unless the payphone service providers and long distance carriers contractually agree to other arrangements. 47 C.F.R. § 64.1300. That rate has changed over time, and continues to change, but at all times relevant to this case it was $0.24 per call. *See id.* § 64.1300(c); *American Pub. Commc'n Council v.*

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[1] The relevant regulations, as they existed at the time Respondent filed its complaint, are reproduced in the Addendum to this brief.

FCC, 215 F.3d 51, 53-54 (D.C. Cir. 2000) (detailing the various rate changes and upholding $0.24 rate). The regulations also require carriers to track coinless payphone calls, report them to payphone service providers, make payments on a quarterly basis, and submit their systems to rigorous audits.

2. Over the past several years, numerous payphone service providers have filed complaints against long distance carriers, seeking compensation allegedly due under the FCC's regulations. While many payphone service providers have brought these complaints in FCC administrative proceedings, others have filed lawsuits in various federal courts across the country. These lawsuits invoke the right in sections 206 and 207 of the Communications Act of 1934 – which envelops the Telecommunications Act of 1996, *see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377 (1999) – to seek damages in federal court for violations of "this chapter." 47 U.S.C. §§ 206, 207.

Federal courts uniformly have recognized, however, that while sections 206 and 207 allow private actions to remedy violations of the Act's *statutory* provisions, they say nothing about any right to bring suits in federal court to enforce agency regulations. *See, e.g., APCC Servs., Inc. v. Sprint Commc'ns Co.*, 418 F.3d 1238, 1246 (D.C. Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766); *Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050 & n.2 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). And nothing in section 276 of the 1996 Act itself requires long distance carriers to compensate payphone owners for coinless calls. That section, courts have emphasized, merely directs the FCC to adopt some form of regulatory plan – not necessarily a "carrier pays" type plan. *See, e.g., APCC Servs.*, 418 F.3d at 1246; *Greene*, 340 F.3d at 1050-52; *Phonetel Techs. v. Network Enhanced Telecomm.*, 197 F. Supp. 2d 720, 721-22

(E.D. Tex. 2002). Nor does section 276 specify any particular compensation rate.

Nonetheless, payphone service providers have attempted to manufacture more indirect legal theories for enforcing the FCC regulations in court. One such theory gives rise to the current dispute.

3. In late 2001, Respondent Metrophones Communications, Inc., an owner and operator of payphones headquartered in Washington State, brought separate lawsuits in the United States District Court for the Western District of Washington against several long distance carriers, including Petitioner Global Crossing Telecommunications, Inc. Respondent alleged that for several years, Petitioner had failed to provide a proper accounting and to compensate it fully for coinless calls transmitted via Petitioner's network. Respondent sought a judgment requiring an accounting and payment of amounts owed since the second quarter of 1999. Respondent and Petitioner do not have a contract with respect to coinless calls, so Respondent relied on the FCC's regulation setting a default rate of $0.24 per call.

Before litigation respecting the 2001 complaint got underway in earnest, Petitioner filed for bankruptcy. The district court then entered an order staying Respondent's case against Petitioner.

In early 2003, Respondent filed a new complaint relating to Petitioner's post-bankruptcy payments for the first three quarters of 2002. J.A. 4-15. The 2003 complaint alleged that during that period, Respondent paid on average only about $0.10 per coinless call, resulting in a shortfall (including accrued interest) of $31,330.42 in damages. J.A. 15.

Respondent initially grounded its 2003 complaint (like its original one) in section 276. After the Ninth Circuit confirmed in another case that this provision did not give rise to a private

cause of action, *Greene*, 340 F.3d at 1053, Respondent moved to amend its complaint to assert that sections 201(b), 407, and 416(c) of the Act permitted it to seek compensation in federal court. J.A. 39-44, 54-56. It also advanced several state-law theories for recovery. J.A. 57-60. Petitioner moved to dismiss the case on the ground that Respondent's complaint failed to state a cause of action and that all proposed amendments likewise would be futile.

The district court dismissed Respondent's section 276 claim but allowed it to amend its complaint, ruling that sections 201(b) and 416(c) – though not section 407 – create private causes of action to recover underpayments for coinless calls. Pet. App. 51a-53a. It also allowed Petitioner to proceed with state law claims for *quantum meruit*, breach of implied contract, and negligence. Pet. App. 46a-50a, 56a. Acknowledging that its rulings raised issues on which there is a "substantial ground for difference of opinion," Pet. App. 61a, the district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b).

4. Respondent and the other long distance carriers Petitioner had sued all filed appeals in the Ninth Circuit. Shortly thereafter, Respondent settled its cases with all of the carriers except for Petitioner.

The Ninth Circuit accepted Petitioner's appeal and affirmed in part and reversed in part. Turning first to Respondent's federal causes of action, the Ninth Circuit noted that Respondent no longer contended that section 276 gave rise to a private cause of action, Pet. App. 9a n.4, and it rejected the district court's holding that section 416(c) did so. Pet. App. 22a-23a. But, expressly creating a circuit split with the D.C. Circuit, *see* Pet. App. 13a n.5, the Ninth Circuit held that section 201(b)'s general prohibition against certain "unjust and unlawful" communications "practices" gives rise to a private

cause of action to recover for violations of the FCC's payphone compensation rules. Pet. App. 6a-21a.

In so holding, the Ninth Circuit gave *Chevron* deference to a recent order in which the FCC asserted, in a single sentence with no analysis, that a violation of its payphone compensation regulations would be enforceable in federal court because it would violate section 201(b), which broadly declares that certain "unjust and unreasonable" communications practices are "unlawful." Pet. App. 11a-14a (citing *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 F.C.C.R. 19,975 (2003) (hereinafter "*2003 Payphone Order*")). The Ninth Circuit claimed in a footnote that the FCC's remark in the *2003 Payphone Order* supported Respondent's cause of action for violations of the FCC's *regulations* because "[a] Congress that intends [a] statute to be enforced through a private cause of action intends [an] authoritative interpretation of the statute to be so enforced as well." Pet. App. 21a n.8 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001)) (emphasis removed).

Turning to Respondent's state law claims, the Ninth Circuit held that section 276(c) of the Act, which prohibits any state requirements inconsistent with the federal regime, preempts Respondent's negligence claim but does not preempt its claims for *quantum meruit* or breach of implied contract. Pet. App. 24a-38a.

5. Petitioner filed a petition for a writ of certiorari raising two questions: (1) whether section 201(b) gives rise to a private cause of action under which payphone owners may sue long distance carriers for alleged violations of FCC regulations; and (2) whether section 276 preempts payphone service providers' state law claims for *quantum meruit* and breach of implied contract. This Court granted certiorari on the first question presented. 126 S. Ct. 1329 (2006).

SUMMARY OF ARGUMENT

Section 201(b) of the Communications Act of 1934 does not give rise to a private cause of action to seek redress for alleged violations of the FCC's payphone compensation regulations.

A. The private cause of action in sections 206 and 207 of the Communications Act gives plaintiffs the right to seek damages only for common carriers' violations of provisions of *the Act*, not for violations of regulations. Numerous provisions in the Act and other federal laws show that when Congress wants to create a private cause of action to enforce regulations, it knows how to do so and does so explicitly. Yet sections 206 and 207 are silent with respect to alleged violations of FCC regulations. This silence must be taken as a congressional decision to bar federal court cases based merely on violations of regulations, especially in light of the fact that other provisions of the Act provide for administrative enforcement of regulations such as those at issue here. Respondent is thus in the same position as a plaintiff bringing suit pursuant to an implied cause of action: it may assert violations of the statutory scheme, but not merely of regulations. *Compare Alexander v. Sandoval*, 532 U.S. 275 (2001).

B. Contrary to the Ninth Circuit's ruling, failing to pay a payphone service provider in accordance with the FCC's payphone compensation regulations does not also violate section 201(b).

1. This Court's decisions make clear that a private cause of action is based on a *statutory* violation – as opposed to a violation of a regulation – only when it is based on the express terms of a statute. No matter how consistent a regulation may be with the policy or directives of a statutory scheme, violating the regulation does not constitute a statutory violation unless the statute itself prohibits the alleged action.

2. Section 201(b) itself does not address, much less prohibit, anything with respect to compensating payphone service providers for coinless calls. That section simply declares unlawful any "charges, practices, classifications, and regulations for and in connection with [interstate and foreign wire or radio] communication service" that are "unjust or unreasonable." It is section 276, not section 201(b), that specifically addresses payphone compensation. But all section 276 does is require the FCC to create some kind of regulatory plan to ensure that payphone service providers are compensated for coinless calls – not necessarily even a plan under which long distance carriers must pay such compensation. If section 276 does not require carriers to compensate payphone service providers for coinless calls, then the generalized language of section 201(b) cannot be read as doing so either.

3. The FCC's statement in its *2003 Payphone Order* that payphone service providers may bring federal court actions for damages based on violations of the payphone compensation regulations because such violations constitute an "unjust and unreasonable practice" under section 201(b), does not alter this analysis. This statement, for two independent reasons, is not the type of agency pronouncement that is eligible for *Chevron* or any other kind of deference. First, the statement fundamentally concerns whether a private right of action exists, and agencies are not entitled to deference when they opine respecting the scope of federal judicial power. The federal courts, not regulatory agencies, are the experts in that realm. Second, the FCC's statement does not evince any deliberation or provide any explanation as to why violations of payphone regulations would violate section 201(b). Agency declarations that are unaccompanied by any reasoning whatsoever are not entitled to deference.

Even if the FCC's statement were eligible for some kind of deference, none would be warranted here, for the statement

goes beyond any meaning that section 201(b) can bear. The only "practices" covered by section 201(b) are (i) those in connection with furnishing "interstate and foreign" communication service, and (ii) those involving service to customers. The FCC's proffered construction of section 201(b), however, contravenes both of these limitations. First, it would apply that section to *intra*state service, since both section 276 and the FCC regulations apply to intrastate, as well as interstate, coinless calls. Second, the FCC's construction would apply section 201(b) far beyond carrier-customer relations, making the section a virtual catch-all for any actions carriers take in violation of any FCC regulations.

There can be little doubt that Congress would not have sanctioned that result. Not only does the Act's private cause of action provision restrict lawsuits to alleged *statutory* violations, but it envisions that the FCC will centralize disputes over regulatory issues, using its powers and expertise to develop coherent nationwide communications policy. This would be nearly impossible if federal judges across the country were left to create a patchwork of inconsistent duties and obligations for our country's common carriers.

ARGUMENT

SECTION 201(B) DOES NOT GIVE RISE TO A PRIVATE CAUSE OF ACTION IN FEDERAL COURT FOR VIOLATIONS OF THE FCC'S PAYPHONE COMPENSATION REGULATIONS.

It is, by now, hornbook law that it is the province of Congress – and *only* Congress – to create a private cause of action to enforce a substantive right in federal court. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (available remedies are limited to those "that Congress enacted into law"). Thus, "[t]he question of the existence of a statutory

cause of action is, of course, one of statutory construction." *Touche Ross*, 442 U.S. at 568; *accord Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). And the *sine qua non* of this inquiry is congressional intent. *Transamerica*, 444 U.S. at 15-16; *Northwest Airlines Inc. v. Transport Workers Union of America*, 451 U.S. 77, 91 (1981). Absent evidence that Congress intended a certain right to be privately enforceable in federal court, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286-87; *accord California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."). Applying customary tools of statutory construction makes it clear that 47 U.S.C. § 201(b) does not give rise to a private cause of action for violations of the FCC's payphone compensation regulations.

A. The Communications Act Provides A Private Cause Of Action Only For Violations Of The Act's *Statutory* Provisions.

Both the text and structure of the Communications Act dictate that the Act limits private causes of action to those seeking damages for *statutory* violations. Private plaintiffs may not seek redress in federal court for violations merely of *regulations* promulgated to carry out statutory objectives. *See* PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW § 3.14.3 (2d ed. 1999) ("The section 206 right of action encompasses only claims that a carrier has violated the *Act*, not for example, violations of FCC regulations or general tort or contract claims.") (emphasis in original) (footnotes omitted).

1. "[A]s with any case involving the interpretation of a statute, [the] analysis must begin with language of the statute itself." *Touche Ross*, 444 U.S. at 568; *see also City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 (1994).

Sections 206 and 207 of the Communications Act expressly create a private cause of action to obtain damages for violations of "the provisions of this chapter" – that is, violations of statutory provisions.[2] The text of those sections, however, does not provide any cause of action to redress violations of FCC *regulations* promulgated pursuant to the Act.

This textual void speaks volumes because "[i]n the absence of strong indicia of a contrary congressional intent, [this Court is] compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). There are no such indicia of a contrary intent here. In fact, other provisions of the Act explicitly provide private causes of action for violations of "regulations," thus demonstrating that when Congress wanted to create such remedial avenues, "it had little trouble doing so." *Pinter v. Dahl*, 486 U.S. 622, 650 (1988).

Two examples will suffice. First, section 227(b) makes it unlawful to make certain kinds of automatic or prerecorded phone calls and directs the FCC to "prescribe regulations to implement the requirements of this subsection." 47 U.S.C. §§ 227(b)(1) & (2). That section also expressly creates a private cause of action for "a violation of this subsection *or the regulations* prescribed under this subsection." *Id.* § 227(b)(3)(A) (emphasis added). Second, section 227(c) directs the FCC to prescribe regulations to protect residential telephone subscribers from unwanted telephone solicitations. *Id.* §§ 227(c)(1) & (2). That section also expressly provides that people who receive phone calls "in violation of the[se]

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[2] By "this chapter," these provisions refer to chapter 5 of the Communications Act, 47 U.S.C §§ 151-615b. Section 206 provides that a common carrier that violates a provision of the Act is liable to injured persons for the full amount of damages sustained as a result. 47 U.S.C. § 206. Section 207 provides that an injured person may file a complaint with the FCC or file suit in federal district court. 47 U.S.C. § 207.

regulations" may, under certain circumstances, bring suit for damages. *Id.* § 227(c)(5) (emphasis added).[3]

The presence of these provisions in the very statutory scheme at issue here confirms that the absence in sections 206 and 207 of any reference to regulations should not be taken as congressional oversight or indifference. "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago*, 511 U.S. at 338 (quotation marks omitted); *accord Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 (1975). Accordingly, the absence of any reference to regulations in sections 206 and 207 is affirmative proof that those provisions do not allow private damages suits based merely on alleged violations of regulations.

Strictly limiting private causes of action under the Act to those with a statutory foundation comports with Congress's craftsmanship in other statutory schemes as well. Numerous other statutory schemes expressly create private causes of action to redress violations of agency regulations, thus removing any lingering doubt that "when Congress wishe[s] to provide a private damage remedy," for violations of regulations, it does so "expressly." *Touche Ross*, 442 U.S. at

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[3] Other remedial provisions of the Act also expressly include violations of regulations within their reach. For example, parts of section 312 empower the FCC to take certain enforcement actions for a broadcaster's "failure to observe any provision of this chapter *or any rule or regulation of the Commission* authorized by this chapter or by a treaty ratified by the United States." 47 U.S.C. § 312(a)(4) (emphasis added); *see also id.* § 312(b) (allowing enforcement "[w]here any person . . . has violated or failed to observe any of the provisions of this chapter . . . [or] has violated or failed to observe *any rule or regulation of the Commission* authorized by this chapter") (emphasis added).

572. Acts that explicitly provide private causes of action to enforce regulations include:

- The Americans with Disabilities Act, which authorizes "any person alleging discrimination on the basis of disability in violation of any provision of this chapter, *or regulations* promulgated under section 12116 of this title" to bring suit in federal court. 42 U.S.C. § 12117(a) (emphasis added); *see also* 42 U.S.C. § 2000e-5(f);

- The Resource Conservation and Recovery Act, which authorizes any person to bring suit "against any person . . . alleged to be in violation of any permit, standard, *regulation*, condition, requirement, or order which has become effective pursuant to this chapter." 42 U.S.C § 6972(a)(1)(A) (emphasis added);

- The Migrant and Seasonal Agricultural Worker Protection Act, which authorizes suit by "[a]ny person aggrieved by a violation of this chapter *or any regulation* under this chapter." 29 U.S.C. § 1854(a) (emphasis added);

- The Endangered Species Act, which authorizes suit by "any person . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter *or regulation* issued under the authority thereof." 16 U.S.C. § 1540(g)(1)(A) (emphasis added).

In these situations – that is, "when a statute has provided a general authorization for private enforcement of regulations" – this Court has explained that regulations with "rights creating" language may be privately enforceable. *Sandoval*, 532 U.S. at 291; *see also Three Rivers Ctr. for Indep. Living, Inc. v. Housing Auth. of Pittsburgh*, 382 F.3d 412, 423 (3d Cir. 2004) ("Congress may . . . explicitly establish a private right of action to enforce regulations"). "But it is most certainly incorrect to

say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Sandoval*, 532 U.S. at 291. That principle governs here.

2. The overall enforcement scheme of the Communications Act confirms that sections 206 and 207 do not allow private plaintiffs to seek redress in federal court for violations of the FCC's regulations. In recognition of Congress's prerogative to decide when to create private causes of action, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica*, 444 U.S. at 19 (quotation marks omitted); *accord Karahalois v. Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 533 (1989) (same); *Touche Ross*, 442 U.S. at 574 (Court is "extremely reluctant" to sanction cause of action "significantly broader than the remedy that Congress chose to provide"); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies").

This is especially so when Congress "make[s] express provision for private enforcement in certain carefully defined circumstances, and provide[s] for enforcement at the instance of the Federal government in other circumstances." *Northwest Airlines Inc. v. Transport Workers Union of America*, 451 U.S. 77, 93-94 (1981). This confluence of factors "strongly evidences an intent *not* to authorize additional remedies." *Id.* at 94 (emphasis added); *see also Sandoval*, 532 U.S. at 290 ("one method of enforcing substantive rules suggests that Congress intended to preclude others"); *Mertens*, 508 U.S. at 254 ("statute's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly") (quotation marks omitted) (emphasis in original). Indeed, "[t]he presumption that a remedy was deliberately

omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Mass. Mutual Life Ins. v. Russell*, 473 U.S. 134, 147 (1985) (quotation marks omitted). *Accord Northwest Airlines*, 451 U.S. at 94 ("It is . . . not within [courts'] competence . . . to amend these comprehensive enforcement schemes by adding to them another private remedy not authorized by Congress.").

Here, Congress has created just such an integrated system of procedures for enforcement. In the Communications Act, "Congress established a comprehensive system for the regulation of communication by wire and radio." *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 6 (1942). And, "the enforcement of the Communications Act is entrusted primarily to an administrative agency" – namely, the FCC. *New England Tel. & Tel. Co. v. Public Utilities Comm. of Maine*, 742 F.2d 1, 5 (1st Cir. 1984) (Breyer, J.) (quotation marks omitted). *See also United Telephone Co. of the Carolinas, Inc. v. FCC*, 559 F.2d 720, 723 (D.C. Cir. 1977) ("The purpose of the Act is to protect the public interest rather than to provide a forum for the settlement of private disputes.").

Specifically, section 276(b)(1)(A)'s directive "to ensure that all payphone service providers are fairly compensated" for coinless calls, combined with the FCC's general authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," 47 U.S.C. § 201(b), gives the FCC ample authority to resolve compensation disputes that arise between payphone service providers and long distance carriers. Title V of the Act authorizes the FCC to assess forfeitures against carriers that the agency determines have "willfully or repeatedly failed to comply with any of the provisions of this chapter or any rule, *regulation*, or order issued by the Commission under this chapter . . . ." 47 U.S.C. §§ 503(b)(1)(B) & (2)(B) (emphasis added). The Act also gives the FCC the power to issue orders

to enforce its regulations. *See* 47 U.S.C. § 154(i) (authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions"); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968) (section 154(i) grants "the administrative process . . . sufficient flexibility to adjust itself to the dynamic aspects" of the industry) (quotation marks omitted).

The FCC, in fact, already has established detailed procedures that allow payphone service providers to seek administrative resolutions of disputes just like this one. Those procedures provide that "any party may file a complaint with the Commission" regarding compensation for coinless calls. *1996 Payphone Order* at 20,597 ¶ 112. FCC guidelines explain when those claims are ripe for agency adjudication, *id.* at 20,597-98 ¶¶ 112, 113; establish when the limitations period for compensation claims commences, *id.* at 20,598 ¶ 113; and provide a "timeliness" defense for carriers, *ibid.* Hence, there can be little doubt that this integrated system of enforcement mechanisms protects the integrity of the FCC's regulations; there is no need for a direct private cause of action.

3. Plaintiffs seeking to use sections 206 and 207 to bring a federal lawsuit for a violation of the Communications Act thus stand in the same position as they would if this Court had implied a cause of action to redress violations of the Act. When this Court implies a private cause of action, plaintiffs may bring suit to enforce the statute itself but not "regulations that go beyond what the statute itself requires." *Sandoval*, 532 U.S. at 293. Plaintiffs invoking sections 206 and 207 of the Communications Act likewise may bring lawsuits seeking damages for *statutory* violations. But sections 206 and 207 do not provide a vehicle for bringing complaints premised on violations of regulations. Absent explicit authorization elsewhere in the Act to enforce the regulations at issue, such complaints can and must be handled administratively. *See*

Conboy v. AT&T Corp., 241 F.3d 242, 252 (2d Cir. 2001) (holding that no private cause of action exists to enforce FCC regulations implementing section section 222 of the Telecommunications Act because "the text of the Telecommunications Act contains no language that explicitly provides a private right of action for damages for violations of the two FCC regulations at issue here").

Indeed, the prohibition here against bringing federal lawsuits based merely on violations of regulations is even clearer than it was in *Sandoval*. There, as in other implied right of action cases, Congress had not spoken at all in the statutory scheme at issue concerning the types of legal pronouncements that could give rise to private causes of action. So this Court was forced to estimate based on statutory clues how far Congress would have wanted the statute's implied private right of action to extend. *Sandoval*, 532 U.S. at 286; *see also Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 294 (1993) (in deciding whether private rights of action exist under the Securities Act, this Court has to "infer how the 1934 Congress would have addressed the issue"). Here, however, Congress has dictated that a private right of action exists to seek damages for violations of statutory provisions, but not for regulations. Those statutory directives must be honored.

B. Failing To Pay A Payphone Service Provider In Accordance With The FCC's Payphone Compensation Regulations Does Not Violate § 201(b).

While purporting at least at one point to accept the premise that private causes of action invoking sections 206 and 207 must assert a violation of a provision of "the *statute itself*," Pet. App. 7a, the Ninth Circuit held that Respondent could bring this suit seeking damages for alleged violations of the FCC's payphone compensation regulations because the FCC stated in its *2003 Payphone Order* that violations of its regulations also

violate section 201(b)'s statutory prohibition against "unjust and unreasonable" communications practices. Pet. App. 8a-21a (discussing *2003 Payphone Order*). But this reasoning does not withstand scrutiny. Nothing in the language of that statute itself requires long distance carriers to compensate payphone service providers for coinless calls, much less at the FCC's then-applicable rate of $0.24 per call. And nothing about the *2003 Payphone Order*'s suggestion to the contrary can create a private cause of action where it does not otherwise exist.

1. A Private Cause of Action to Enforce a Statute Extends Only to Violations of the Statute's Terms.

In determining whether an asserted cause of action is properly limited to asserting a "statutory" violation, this Court's precedent teaches that a private plaintiff's claim must rest on *express* statutory prohibitions. If a regulation prohibits something that the express terms of the statute do not, then a violation of that regulation is not a violation of the statute.

This Court's recent decision in *Sandoval* well illustrates this principle. There, Department of Justice regulations promulgated "to effectuate the provisions of [§] 601" of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, prohibited policies and practices that had a disparate impact on protected classes. *Sandoval*, 532 U.S. at 278. The plaintiff sought to enforce these regulations in federal court based on the statute's implied cause of action. This Court accepted the legitimacy of the regulations, *id.* at 281, but nevertheless held that they could not give rise to a private lawsuit. This Court explained that because § 601 itself "prohibits only intentional discrimination" – and not disparate impact discrimination – the plaintiff could not invoke the statute's private cause of action to remedy violations of that which the statute itself did not proscribe, *id.* at 280, 291.

Pre-*Sandoval* case law reinforces the requirement that a private cause of action based on a statutory violation must be grounded in a statutory prohibition itself. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 166-67 (1994), the plaintiff asserted a private cause of action for aiding and abetting a deceptive securities practice. This Court did not reject the SEC's conclusion that such liability would help effectuate the purposes of the statute. *Id.* at 189 (acknowledging that "policy arguments in favor of aiding and abetting liability can also be advanced"). But it held that such a cause of action did not exist because "the text of the [relevant] statute controls," and "the *text* of § 10(b) of the Securities Act does not prohibit aiding and abetting." *Id.* at 173, 191 (emphasis added). Other decisions are in accord. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-99 (1976) (rejecting SEC's reading of section 10(b) to include civil liability for negligent acts because the agency's interpretation "would add a gloss to the *operative language of the statute* quite different from its commonly accepted meaning") (emphasis added); *Mertens*, 508 U.S. at 254-55 (despite the availability at common law of cause of action for a nonfiduciary's knowing participation in breach of fiduciary duty, such a cause of action does not exist under ERISA because no such duty "explicitly" appears in statute's terms).

In sum, no matter how consistent a regulation may appear to be with the policy or directives of a statutory scheme, violating the regulation does not constitute a statutory violation unless the statute itself prohibits the alleged action.

2. Section 201(b) Does Not Address, Much Less Prohibit, the Conduct Alleged Here.

Section 201(b) declares that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign wire or radio] communication service, shall be just and reasonable" and that any such charge, practice,

classification, or regulation that is "unjust or unreasonable" is "unlawful." Nothing in this provision requires carriers to compensate payphone operators for coinless calls, much less according to the $0.24-per-call rate then specified in the FCC regulations. The FCC's regulations upon which Respondent's lawsuit is based thus plainly "go beyond what the statute itself requires." *Sandoval*, 532 U.S. at 293 n.8.

a. When interpreting the language of any given statute, this Court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995); *see also John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993) (this Court is not guided by "a single sentence or member of a sentence, but looks to the provisions of the whole law, and to its object and policy") (quotation marks omitted). Accordingly, because section 201(b) says nothing, at least on its face, about payphone compensation, it is essential to begin the inquiry into the provision's purported application to that subject by understanding the two statutes in the Communication Act that actually speak directly to it: sections 226(e)(2) and 276. Those statutes demonstrate that Congress has never so much as hinted that a long distance carrier's failing to compensate a payphone service provider for coinless calls might be, in the words of section 201(b), "unjust or unreasonable."

In section 226(e)(2), enacted in 1990, Congress did not take any position on whether payphone service providers should be compensated *at all* for coinless calls. Instead, it simply directed the FCC to "consider the need to prescribe compensation" for payphone service providers for such calls. 47 U.S.C. § 226(e)(2). And after considering this issue, the FCC *declined* to require compensation for most coinless calls. *See Policies and Rules Concerning Operator Services Access and Pay Telephone Compensation*, 6 F.C.C.R. 4736, 4745-46 ¶¶ 34, 36 (1991), *recon.*, 7 F.C.C.R. 3251, 3259 ¶ 50 (1992);

see also Illinois Pub. Telecomm., 117 F.3d at 559 (describing FCC's order and its consequences). So it is clear, at least as of the early 1990's, that no one, including the FCC, believed that any part of the Act required payphone service providers be compensated for coinless calls.

The Telecommunications Act of 1996 changed the law in that regard, but only slightly. It directed the FCC to establish a per call compensation plan to ensure that payphone service providers are compensated (save exceptions not relevant here) for "each and every" call completed from their payphones, including coinless calls. 47 U.S.C. § 276(b)(1)(A). But even though the Act now requires payphone operators to be compensated for coinless calls, it is silent concerning who should pay these fees or how much they should be. As even the Ninth Circuit acknowledged, section 276 "does not impose any obligations on *carriers*" to compensate payphone operators for coinless calls. Pet. App. 18a (emphasis added); *see also APCC Servs.*, 418 F.3d at 1246 ("Nothing in the statute requires the [FCC] to designate the IXC as the party responsible for payment."). The FCC's regulations would be perfectly valid if they required callers, instead of carriers, to compensate payphone service providers for coinless calls. *See Greene*, 340 F.3d at 1051. Thus, both times that Congress has focused on the specific issue of payphone compensation, it has declined to prescribe – or even to suggest – a particular method for insuring reimbursement of coinless calls.[4] Neither

[4] The most extensive discussion in the legislative history of the provision that became § 276 confirms that Congress had no opinion as to what kind of compensation plan was proper:

> In place of the existing regulatory structure, the Commission is directed to establish a new system whereby all payphone service providers – BOC and independent – are fairly compensated for every interstate and intrastate call made using their payphones, including, for example, "toll-free" calls to subscribers to 800 and new 888 services and calls dialed by means of carrier access codes. Carriers and customers that

payphone-specific statute makes any reference whatsoever to section 201(b).

Even the FCC itself, in responding to section 276, has been somewhat agnostic concerning who should compensate payphone service providers for coinless calls and how much they should pay. As an initial matter, the FCC has acknowledged that people who place coinless payphone calls are the actual "cost causers." *1996 Payphone Order* at 20,585 ¶ 85. It, therefore, was not any equitable impulse that pushed the FCC to adopt a "carrier pays" system. Rather, the FCC adopted this system simply "in order to maintain the convenience of coinless calling upon which the public has come to rely." *Illinois Pub. Telecomm.*, 117 F.3d at 567.[5] The carrier pays system, in fact, explicitly contemplates that long distance carriers that are required to pay payphone service providers for calls will "recover their own costs" by billing or contracting in advance with the callers. *1996 Payphone Order* at 20,584 ¶ 83. It thus is hard to say, at least based on these

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> benefit from the availability of a payphone should pay for the service they receive when a payphone is used to place a call. In crafting implementing rules, the Commission is not bound to adhere to existing mechanisms or procedures established for general regulatory purposes in other provisions of the Communications Act of 1934.

H.R. Rep. No. 104-204(I), at 88 (1995).

[5] Even within the "carrier pays" system, the FCC "has reversed positions several times on the issue of *which* carrier should pay the PSP when more than one carrier handles a call." Pet. App. 12a (emphasis in original). Sometimes numerous carriers handle the same coinless payphone call. A local exchange carrier ("LEC") serving the payphone transmits the call to an interexchange carrier's ("IXC") switching facilities. *See, e.g., In re APCC Services, Inc.*, 20 F.C.C.R. 2073, 2075 (2005). The IXC, in turn, may then transmit the call to the LEC serving the call recipient or it may instead transmit the call to a "reseller." *Id.* The call may be transmitted to one or more additional resellers before landing at the LEC serving the call recipient. *Id.* at 2075-76; *see also* Pet. App. 12a.

realities, that there is anything "unjust or unreasonable" about a particular carrier not compensating a payphone service provider for coinless calls. Such inaction is, at most, an administrative breakdown.

Indeed, had the FCC used its discretion under section 276 to assign this payment obligation directly to *callers* instead of carriers, there would be no dispute whatsoever that failures to pay could not give rise to any private cause of action. Sections 206 and 207 pertain only to violations committed by "common carrier[s]." They do not allow aggrieved parties to sue any other persons or entities. Surely if Congress had wished payphone service providers to have a private cause of action to collect compensation for coinless calls, it would not have let this right depend on the possibility that the FCC would ultimately designate long distance carriers instead of anyone else as responsible for such compensation.

The same is true with respect to rates. The FCC has acknowledged that there are several viable methods for setting compensation rates for payphone calls. Rates can be based on market rates, the payphone service provider's costs, or other measures. *See, e.g., Illinois Pub. Telecomm.*, 117 F.3d at 559-60 (discussing various approaches). Indeed, over time, the FCC has established the per call rate at prices ranging from $0.35 to $0.284 to $0.24 (the rate at the time of this case). *Ibid.* The D.C. Circuit also has acknowledged that even though the $0.24-per-call rate applicable here was within the generous bounds of agency discretion, the data underlying the rate "could be subjected to various challenges" on the ground that it still pushes rates too high. *American Pub. Commc'n Council*, 215 F.3d at 58. Add to this situation the fact that the FCC regulations also expressly invite long distance carriers and payphone service providers to contract between themselves at any different per call rate they may wish, *see* 47 C.F.R. § 64.1300(c), and it becomes clear that the $0.24 per call rate Respondent seeks to enforce here is hardly necessary to

maintain a just and reasonable system of telecommunications in the United States. However constructive FCC's regulations may be, they cannot be attributed to Congress.

b. Because the statutes that specifically discuss payphone compensation have never suggested a right or wrong way of compensating payphone service providers, it follows that section 201(b) – a statute enacted in 1934 as part of the original Act that does not even mention payphone compensation – cannot be read indirectly to impose requirements that Congress explicitly declined to impose directly. It is a cardinal rule of statutory construction that "a statute dealing with a narrow, precise, and specific subject [cannot be] submerged by a . . . statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *see also Green v. Bock Laundry Machine Co.*, 480 U.S. 504, 524 (1989) ("A general statutory rule usually does not govern unless there is no more specific rule."). Therefore, because neither section 226(e)(2) nor section 276 requires long distance carriers to compensate payphone service providers for coinless calls, section 201(b)'s generalized prohibition against "unjust and unreasonable" practices cannot be read as doing so either.

The Ninth Circuit tried to play down this problem by asserting that section 276 "cannot be considered more specific" than section 201(b) because section 276 does not "impose any obligations on carriers" to compensate payphone service providers for coinless calls or "relieve them of any [such] obligations." Pet. App. 18a. But this analysis simply begs the question. The very issue here is whether the Act imposes any such obligation on carriers. And the provision in the Act that even the Ninth Circuit acknowledges "more specifically addresses the subject of payphone regulation" does not impose any such obligation. *Ibid.* Ergo, no other provision may do so. One cannot simply *assume* that the more general provision imposes such an obligation and then pronounce that, therefore, it actually is the more specific provision of the two.

The FCC's reports and orders that generated and have continually refined the payphone compensation regulations underscore that section 201(b) cannot seriously be said to compel long distance carriers to compensate payphone service providers for coinless calls according to the terms of those regulations. In the first paragraph of the first report and order on the subject, the FCC pronounced that it was adopting regulations "to implement Section 276." *1996 Payphone Order* at 20,543 ¶ 1. Subsequent reports and orders consistently describe that section as the foundation for the FCC's authority. *See In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order*, 13 F.C.C.R. 1778, 1779 ¶ 1 (1997) (order "based on our analysis of the record and the statutory policy goals of Section 276"); *Third Report and Order*, 14 F.C.C.R. 2545, 2547 ¶ 1 (1999) ("In this proceeding, we continue our efforts to implement the requirements of section 276.") (hereinafter "*1999 Payphone Order*"); *Third Order on Reconsideration and Order on Clarification*, 16 F.C.C.R. 20,922, 20,923 ¶ 4 (2001) ("to implement Section 276"); *Fourth Order on Reconsideration and Order on Remand*, 17 F.C.C.R. 2020, 2020-21 ¶ 2 (2002) (this and related orders "implement section 276"); *Fifth Order on Reconsideration and Remand*, 17 F.C.C.R. 21,274, 21,275 ¶ 2 (2002) ("The foundation of our authority to regulate per-call and per-phone compensation is section 276 of the Act"); *2003 Payphone Order* at 19,976 ¶ 2 ("adopt[ing] these rules to ensure that" payphone service providers are compensated "under section 276"). None of these reports and orders suggests that it is intended to interpret or implement section 201(b)'s prohibition against "unjust and unreasonable" communications practices.

This, of course, is no surprise. Section 201(b) was on the books for sixty-two years before section 276 was enacted, and no entity or party ever suggested during all those years that it spoke in any way to payphone compensation. Yet as soon as

Congress enacted section 276 – asking the FCC to develop a compensation system but not suggesting that any particular kind of system was necessary – the FCC sprung into action. The FCC's regulations implement section 276; they do not interpret section 201(b).

Straining to find any evidence that the FCC's reports and orders concerning payphone compensation have some connection to section 201(b), the Ninth Circuit noted that the FCC has "cited § 201, in addition to § 276 and other sections, as authority" for the enactment of the payphone regulations. Pet. App. 9a. But the paragraph the Ninth Circuit referenced is nothing more than the boilerplate recitation of all sections of the Communications Act that create the FCC and grant it general authority to enact regulations. *See 1999 Payphone Order* at 2648 ¶ 232 ("Accordingly, pursuant to authority contained in Sections 1, 4, 201-205, 226, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 215, 218, 219, 220, 226, and 276, IT IS ORDERED that the policies, rules, and requirements set forth herein ARE ADOPTED."). The payphone regulations no more interpret or implement a particular part of a particular subsection of section 201(b) than any part of any of the other subsections of the eleven sections in this laundry list, most of which unquestionably are irrelevant to the exercise of the FCC's rulemaking authority here. *See* 47 U.S.C. § 202 (discriminatory practices); § 203 (filing tariffs); § 204 (hearings on carrier rates); § 205 (prescription of carrier rates); § 215 (access to books and records); § 218 (inquiries into carrier management practices); § 219 (reports by carriers); § 220 (accounting methods, depreciation).

3. The FCC's Reference to § 201(b) in the *2003 Payphone Order* Does Not Alter This Analysis.

Instead of concluding, as it should have, that section 201(b)'s silence with respect to payphone compensation required

dismissal of Respondent's complaint, the Ninth Circuit found a private cause of action to exist because the FCC stated in its *2003 Payphone Order* that payphone service providers could bring lawsuits in federal court, in part based on section 201(b), to recover for violations of the FCC's payphone regulations. Pet. App. 14a-21a. The relevant passage of the order reads in full:

> To the extent APCC's argument [that certain particular carriers should compensate payphone service providers for coinless calls when multiple carriers handle a call] is based on ease of collecting owed debts, the D.C. Circuit, in upholding the reasonableness of the Commission's decision in *APCC v. FCC* [, 215 F.3d 51, 56 (D.C. Cir. 2000),] found that the [payphone service providers] had remedies to collect this debt from delinquent carriers. A failure to pay in accordance with the Commission's payphone rules, such as the rules expressly requiring such payment that we adopt today, constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the Act.

2003 Payphone Order at 19,990 ¶ 32.

Although the FCC's reference to section 276 flatly contradicts the Ninth Circuit's earlier decision in *Greene v. Sprint Communications Co.*, 340 F.3d 1047 (9th Cir. 2003), that section 276 does *not* give rise to a private cause of action – a decision that Respondent does not challenge – the Ninth Circuit reasoned that the FCC's statement is an authoritative interpretation of *section 201(b)*. And the Ninth Circuit held that the FCC's supposed interpretation gives rise to a private cause of action because a Congress that, as here, "'intends the statute to be enforced through a private cause of action intends the *authoritative interpretation of the statute* to be so enforced

as well.'" Pet. App. 21a n.8 (quoting *Sandoval*, 532 U.S. at 284) (emphasis added by Ninth Circuit). This analysis, however, grants undue deference to the FCC's statement and thus misapplies the quoted passage from *Sandoval*.

a. The FCC's statement is not a type that is eligible for any kind of deference.

There are two independent reasons why the FCC's statement is not eligible for any kind of deference: (i) it concerns the scope of the Act's private cause of action, not substantive statutory terms; and (ii) it is not explained by sufficient – indeed, any – reasoning.

i. The FCC's statement is centrally concerned with providing a remedy for violations of the payphone compensation regulations, *2003 Payphone Order* at 19,990 ¶ 32, not substantive provisions of the Communications Act. Only five weeks before the FCC issued its statement, the Ninth Circuit had held in *Greene* that section 276 did *not* give rise to a private cause of action for violations of the FCC's payphone compensation regulations and used broad language suggesting that no other provision of the Act did either. *See* Pet. App. 6a-8a; *Greene*, 340 F.3d at 1050-52. The FCC's statement implicitly responded to that opinion, asserting for the first time – and without any prior notice – that the regulations could in fact support damages suits in federal court. The Ninth Circuit itself thus understood that the true significance of the FCC's statement is the assertion of an "availability of actions for damages under §§ 206 and 207." Pet. App. 13a.

Although the Ninth Circuit appreciated the aim of the FCC's statement, it overlooked that neither *Chevron* nor any other kind of deference applies when an agency opines respecting the presence of federal judicial power to provide remedies for violations of federal law. "[T]he authority to construe a statute is fundamentally different from the authority to fashion a new

rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines*, 451 U.S. at 97. When an agency construes a substantive statute within its purview, its views are entitled to deference because the agency is an "expert" in the area. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 48 (1983) (quotation marks omitted); *see also Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 652 (1990) ("[P]ractical agency expertise is one of the principal justifications behind *Chevron* deference."). But the federal courts, not agencies, are the experts when it comes to explicating the reach of statutes that create private causes of action.

This Court's decision in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), illustrates the point. There, a federal statute provided a private cause of action for violations of the Seasonal Agricultural Worker Protection Act. The Department of Labor enacted a regulation purporting to refine the circumstances under which that right could be invoked when state remedies also were available. Even assuming that there was ambiguity as to whether a private cause of action existed under those circumstances, this Court squarely held that it "need not defer" to an agency's view when the agency purports to "regulate the scope of judicial power vested by the statute." *Id.* at 649-50. This Court explained that when

> Congress establish[es] an enforcement scheme . . . and provide[s] aggrieved [individuals] with direct recourse to federal court where their rights under the statute are violated . . . , it would be inappropriate to consult executive interpretations of [the statute] to resolve ambiguities surrounding the scope of [the statute's] judicially enforceable remedy.

Id. at 650. Basic separation of powers principles dictate that courts have the sole authority to decide when a private cause of action is available.

The Ninth Circuit's decision to defer to the FCC's statement in the *2003 Payphone Order* contravenes this rule. The FCC's statement does not truly interpret the statute's substance, as *Sandoval* contemplated when it said that authoritative interpretations of a statute "are covered by a cause of action to enforce that section." 532 U.S. at 284. Rather, the FCC's statement is an attempt to manufacture a cause of action that does not otherwise exist. The statement itself explains that it concerns the "remedies" payphone service providers have to "collect[] owed debts" from delinquent carriers. *2003 Payphone Order* at 19,990 ¶ 32. And the statement asserts – contrary to Congress's requirement in sections 206 and 207 that private lawsuits be based on *statutory* violations – that violations of the FCC's regulations can support a private action for damages in federal court. Just like the agency in *Adams Fruit*, the FCC lacks the authority to "regulate the scope of the judicial power vested by the [private cause of action] statute." *Adams Fruit*, 494 U.S. at 650. And just like the agency in *Northwest Airlines*, the FCC may not "provide a new remedy which Congress has decided not to adopt." 451 U.S. at 97.[6]

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[6] Even if the FCC's construction of the Act's private cause of action provisions were eligible for deference, none would be warranted here. The sole reason the FCC advanced for asserting that payphone service providers should be able to bring lawsuits to seek damages based on violations of the FCC's payphone compensation regulations was that the D.C. Circuit supposedly had suggested that such lawsuits would be proper. *See 2003 Payphone Order* at 19,990 ¶ 32 (relying on *APCC v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000)). The D.C. Circuit, however, has since repudiated this interpretation of its precedent, holding squarely that such lawsuits may *not* be brought. *See APCC Servs.*, 418 F.3d at 1247-48. Agency action that is based on an erroneous view of the law cannot be sustained. *See, e.g., SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (rejecting agency conclusion

ii. Even if the FCC's statement in the *2003 Payphone Order* could properly be read as expressing a substantive interpretation of section 201(b) instead of opining respecting the availability of federal court remedies, the statement was not the product of sufficient deliberation or explanation to warrant any deference. The concept of *Chevron* deference presupposes that an agency engage in a deliberative process. Accordingly, this Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *State Farm*, 463 U.S. at 48. It is "require[d] that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. ___, ___ (2006) (slip op. at 6) (agency's definition of statutory term did "not command deference from this Court" because expressions of that understanding did not "set out agency reasoning"); *State Farm*, 463 U.S. at 43 ("agency must . . . articulate a satisfactory explanation for its action"). Such disclosures assure this Court and the public that agency pronouncements are the product of reflection instead of whim or caprice.

Here, the FCC has not offered any evidence whatsoever that it suitably deliberated on the topic of whether failing to abide by its payphone compensation regulations constitutes an unjust or unreasonable practice under section 201(b). The FCC's Notice of Proposed Rulemaking that presaged the *2003 Payphone Order* made no mention of section 201(b), much less provided any hint that the FCC was considering making a finding that a violation of its payphone compensation regulations would implicate that provision. *See Payphone Docket*, Further Notice of Proposed Rulemaking, 18 F.C.C.R. 11,003 (2003). It therefore comes as no surprise that the FCC did not receive any briefing or comments on the issue.

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because "the cases upon which [the agency relies] do not establish principles of law" for which the agency cited them).

Nor did the FCC provide any reasoning at all as to why violations of the specific regulations at issue here supposedly constitute unjust and unreasonable practices. The FCC's statement simply pronounces that violations of any of the hundreds of its rules respecting payphone compensation constitute an unjust and unreasonable practice. *2003 Payphone Order* at 19,990 ¶ 32. This passage provides no reason whatsoever why a practice, such as the one here, that Congress has never prohibited and that the FCC itself declined in 1990 to prohibit, *see supra* at 23, suddenly would constitute an "unjust or unreasonable" practice under the longstanding language of section 201(b). To say the least, some explanation for such a dramatic reversal of policy should be required before creating a new kind of liability in federal court. Because "[t]here are no findings and no analysis here to justify the choice made [and] no indication of the basis on which the [agency] exercised its expert discretion," *State Farm*, 463 U.S. at 48 (quotation marks omitted), the Ninth Circuit erred in deferring to the FCC's statement.[7]

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[7] The Ninth Circuit at one point attempted to fill this void by looking to the *amicus* brief that the FCC submitted to it, in which the agency attempted to provide an after-the-fact rationale for its supposed interpretation of section 201(b). Pet. App. 20a; *see* Brief of FCC as Amicus Curiae, *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056 (9th Cir. 2005) (No. 04-35287), *available at* 2004 WL 2297782. The FCC's *amicus* brief, however, was too little, too late because "the considerations urged [therein] in support of the Commission's order were not those upon which its action was based." *Chenery*, 318 U.S. at 92. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself" – not "appellate counsel's *post hoc* rationalizations for agency action." *State Farm*, 463 U.S. at 50. *See also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (refusing to defer to agency position "urged only in the context of this litigation"); *Chenery*, 318 U.S. at 94 (agency action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act").

b. Even if the FCC's statement were eligible for deference, none would be warranted here.

Even if the FCC's statement that failures to pay in accordance with its payphone compensation regulations can give rise to federal damages suits were eligible for deference, none would be warranted here. "The weight [accorded to an administrative declaration] . . . depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001). And "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994). The FCC's statement here is not entitled to deference for three specific reasons: (i) it stretches the meaning of section 201(b)'s "unjust or unreasonable" phrase too far, by applying it to conduct that cannot plausibly be characterized as either; (ii) it stretches the language of section 201(b)'s term "practice" too far, by suggesting it applies to *intra*state communications service and to business arrangements between communications carriers; (iii) it would turn section 201(b) into a catchall provision, enabling the FCC, contrary to congressional will, to declare that virtually all of its regulations give rise to private causes of action.

i. As explained *supra* at 22-29, there is nothing "unjust or unreasonable" about a long distance carrier declining to compensate a payphone service provider for a coinless call. As the FCC itself has recognized, *callers*, not carriers, are the "cost causer[s]" when they place coinless calls from payphones. *1996 Payphone Order* at 20,585 ¶ 85. It is *callers* who are maneuvering to avoid putting money into payphones. And it is *callers* who ought to be paying payphone service providers for the use of their payphones. The FCC regulations put long distance carriers on the hook for these payments only

to effectuate consumer convenience. *Id.*; *Illinois Pub. Telecomm.*, 117 F.3d at 567. That being so, a carrier's failure to pay a payphone service provider to compensate for the actions of callers is hardly unjust or unreasonable.

The Ninth Circuit brushed aside this predicament, reasoning that additional statutory language in section 201(b) "gives the Commission broad power to enact such 'rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' *including* sections that were later added by the Telecommunications Act of 1996." Pet. App. 15a (quoting section 201(b)) (emphasis added by Ninth Circuit). In the Ninth Circuit's view, therefore, even though the Act itself in section 201(b)'s "unjust and unreasonable" language does not deem unlawful the conduct Respondent alleges here, the FCC's broader "rulemaking authority" permits the agency to declare it so. Pet. App. 16a. But this method of attempting to ground the FCC's regulations in statutory pronouncements runs headlong into *Sandoval*. In *Sandoval*, this Court made clear that regulations based merely on a directive to carry out the provisions of a statute instead of any rights-creating language in the statute itself are not statutorily based so as to give rise to a private cause of action. 532 U.S. at 285-89.

That is precisely the case here. While the rulemaking directives in sections 201(b) and 276 give the FCC the power to issue regulations that require long distance carriers to compensate payphone service providers at a certain rate for coinless calls, the "unjust or unreasonable" language in section 201(b) does not require such compensation. Accordingly, the Ninth Circuit was simply wrong in holding that the FCC's broad rulemaking authority renders reasonable the agency's assertion that any violation of its payphone compensation regulations is "unjust or unreasonable."

ii. Even if a long distance carrier's failure to compensate a payphone service provider for a coinless call at $0.24 per call

were somehow "unjust or unreasonable," such failure would not be a communications "practice" covered by section 201(b). The only "practices" covered by section 201(b) are those "in connection with . . . [a] communications service" described in section 201(a). Section 201(a), in turn, requires common carriers engaged in "interstate or foreign communication by wire or radio to furnish such communication service upon a reasonable request therefor." This language contains two independent limitations that exclude the conduct Respondent alleges here from its reach.

First, section 201(b) applies only to "interstate or foreign" communications services. Yet section 276 and the FCC's payphone compensation regulations apply to "*intra*state and interstate call[s]." 47 U.S.C. § 276(b)(1)(A) (emphasis added); *see also 1996 Payphone Order* at 20,543 ¶ 1 (FCC rules apply to "every completed intrastate and interstate call using a payphone") (quotation marks omitted). Therefore, violating those regulations with respect to compensation for *intra*state calls cannot possibly violate section 201(b); any action relating to such calls is beyond that provision's reach. This jurisdictional disconnect between section 276 and section 201(b) does not merely mean that only some violations of the FCC's regulations (those with respect to interstate calls) violate section 201(b). Rather, it demonstrates that section 201(b) simply does not apply to payphone compensation, for it would not make any sense to legislate that failures to compensate payphone service providers for coinless interstate calls is unjust and unreasonable but failures to compensate them for such *intra*state calls is not.

Second, the text of the Act's common carrier provisions make clear that section 201(b) regulates carriers' relationships only with customers who request communications service; it does not regulate carriers' relationships with other carriers. *See National Cable & Telecommunications Ass'n v. Brand X*, 125 S. Ct. 2688, 2696 (2005) ("Telecommunications carriers . . .

must charge just and reasonable, nondiscriminatory rates to their *customers*, 47 U.S.C. §§ 201-209.") (emphasis added); *Boomer v. AT&T Corp.*, 309 F.3d 404, 418 (7th Cir. 2002) ("Sections 201 and 202, read together, demonstrate a congressional intent that individual long-distance *customers* throughout the United States receive uniform rates, terms and conditions of service.") (emphasis added); 2 HARVEY L. ZUCKERMAN ET AL., MODERN COMMUNICATIONS LAW § 12.1.C.2 (1999) ("Section 201 . . . establishes the duty of common carriers to furnish service upon reasonable request and to establish reasonable charges, practices, classifications and regulations *regarding service*.") (emphasis added). This limitation is inherent in section 201's reference to "request[s]" to "furnish communications service," as well as neighboring provisions' use of the term "practices" explicitly to refer to things "affecting . . . charges" for service and rate schedules. 47 U.S.C. § 203; *see also id.* §§ 202, 204-05.

Lest the plain text of the Act leave any doubt that section 201(b) applies only to the rates and services carriers provide to customers, "reasonable inferences from [the statute] give a clear answer," *Brown v. Gardner*, 513 U.S. 115, 120 (1994), that Congress did not intend section 201(b) to apply beyond that realm. Because "a word 'gathers meaning from the words around it,'" *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 702 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)), "a string of statutory terms raises the implication that the 'words grouped in a list should be given related meaning.'" *S.D. Warren Co.*, 547 U.S. at ____ (slip op. at 7) (quoting *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) ("That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well."). Here, the term "practice" in section 201(b) is grouped with the transactional terms "charge," "classification," and "regulation." It would be "quite a leap," as the D.C. Circuit previously has recognized, to move from that context of

transactional terms "to an implication that by the word 'practice,' Congress empowered the Commission not merely to effect a reformation of some 'practice' in a more traditional sense of actions habitually being taken" with respect to rates and services, but to reach virtually any action a carrier takes in the course of its business, on the ground that all actions are indirectly related to rates and services. *California Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004).

The Ninth Circuit's only response to this point was its assertion that section 201(b) is "*not clearly unrelated* to a carrier's rates and services" because "Congress and the Commission have recognized [that payphone service providers] must be compensated if customers are to be able to use the dial-around long distance service that the carrier provides." Pet. App. 17a (emphasis added). But agency determinations may be upheld only upon reasoning advanced by the agency itself, *see, e.g.*, *Chenery*, 318 U.S. at 88, and *the FCC* did not make this argument when referencing section 201(b) in the *2003 Payphone Order*. And no wonder, for it conflicts with the plain text of the statute. Section 201(b) requires regulated practices to be "connect[ed]" with carrier-customer dealings, not "not clearly unrelated" to them.

In any event, the Ninth Circuit's assertion concerning what Congress – the only entity that matters when assessing whether an agency interpretation comports with a statute – supposedly has recognized is demonstrably untrue. In 1990, Congress was expressly agnostic as to whether payphone service providers should be compensated for such calls. *See supra* at 22-23. In 1996, Congress directed the FCC to ensure that payphone service providers are compensated, but not so that customers would be "able to use the dial-around long distance service that the carrier provides." Pet. App. 17a. Indeed, the several years prior to 1996 proved that customers would be able to make coinless calls regardless of whether payphone service providers were compensated. Congress simply decided in 1996 that it

wanted to spur increased competition in this market and to promote even more widespread deployment of payphone services. 47 U.S.C. § 276(b)(1).

The Communications Act's lineage reinforces the requirement that practices relate meaningfully to the services provided and rates charged to customers to be covered by section 201. The Act was derived from the Interstate Commerce Act. *See* Pet. App. 16a n.7 (citing S. Rep. No. 781, 73d Cong., 2d Sess. 4 (1934) (detailing ICA provisions from which Congress drew each section of Communications Act)); *Conboy*, 241 F.3d at 250 ("[D]ecisions construing the ICA are persuasive in establishing the meaning of the Communications Act."). And this Court already has held that covered "practices" under the Interstate Commerce Act are limited to those connected "with the fixing of rates to be charged and prescribing of service to be rendered." *Missouri Pacific R.R. Co. v. Norwood*, 283 U.S. 249, 257 (1931). The same rule pertains here and forecloses the FCC's suggestion to the contrary.

iii. In the end, the FCC's expansive conception of section 201(b) runs right back into the plain language of sections 206 and 207. If the FCC were right in suggesting that a long distance carrier's violation of the payphone compensation regulations constituted an unjust or unreasonable communications practice, then violating virtually any regulation respecting common carriers would violate section 201(b). And as the D.C. Circuit has explained, "the notion that it is an inherently unreasonable practice, within the meaning of section 201(b), to violate a Commission regulation . . . [would] convert[] any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court." *APCC Servs.*, 418 F.3d at 1247. Yet if there is one thing that the Act makes clear, it is that Congress drafted the private cause of action provisions to *preclude* violations

merely of regulations from giving rise to lawsuits in federal courts. *See supra* at 11-18.

Not only would deferring to the FCC's view here flout this congressional intent, it would open the door to untold mischief, because such a drastic expansion of the Communications Act's private cause of action provisions "would place th[e] interpretive function [of the Act] squarely in the hands of private parties and some 700 federal district judges, instead of in the hands of the Commission." *New England Tel. & Tel. Co. v. Public Utilities Comm. of Maine*, 742 F.2d 1, 6 (1st Cir. 1984) (Breyer, J.). This would "threaten[] the sound development of a coherent nationwide communications policy – a central objective of the Act." *Id.* at 5; *accord Conboy*, 241 F.3d at 253. Congress could not possibly have intended the FCC to wield section 201(b) in a way that would erase the industry uniformity it was attempting to create through the passage of the Communications Act.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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47 C.F.R. § 64.1300 Payphone compensation obligation.

(a) Except as provided herein, the first facilities-based interexchange carrier to which a completed coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier shall compensate the payphone service provider for the call at a rate agreed upon by the parties by contract.

(b) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.

(c) In the absence of an agreement as required by paragraph (a) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.24.

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47 C.F.R. § 64.1301 Per-payphone compensation.

(a) *Interim access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix A of the *Fifth Order on Reconsideration and Order on Remand* in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for payphone access code calls and payphone subscriber 800 calls for the period beginning November 7, 1996, and ending October 6, 1997, in the amount listed in Appendix A per payphone per month. A complete copy of Appendix A is available at www.fcc.gov.

(b) *Interim payphone compensation for inmate calls.* In the absence of a negotiated agreement to pay a different amount, if a payphone service provider providing inmate service was not compensated for calls originating at an inmate telephone during the period starting on November 7, 1996, and ending on October 6, 1997, an interexchange carrier to which the inmate telephone was presubscribed during this same time period must compensate the payphone service provider providing inmate service at the default rate of $0.238 per inmate call originating during the same time period, except that a payphone service provider that is affiliated with a local exchange carrier is not eligible to receive payphone compensation prior to April 16, 1997, or, in the alternative, the first day following both the termination of subsidies and payphone reclassification and transfer, whichever date is latest.

(c) *Interim compensation for 0+ payphone calls.* In the absence of a negotiated agreement to pay a different amount, if a payphone service provider was not compensated for 0+ calls originating during the period starting on November 7, 1996, and ending on October 6, 1997, an interexchange carrier to which the payphone was presubscribed during this same time period must compensate the payphone service provider in the default amount of $4.2747 per payphone per month during the same time period, except that a payphone service provider that is affiliated with a local exchange carrier is not eligible to receive payphone compensation prior to April 16, 1997, or, in the alternative, the first day following both the termination of subsidies and payphone reclassification and transfer, whichever date is latest.

(d) *Intermediate access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different

amount, each entity listed in Appendix B of the *Fifth Order on Reconsideration and Order on Remand* in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for access code calls and payphone subscriber 800 calls for the period beginning October 7, 1997, and ending April 20, 1999, in the amount listed in Appendix B for any payphone for any month during which per-call compensation for that payphone for that month was not paid by the listed entity. A complete copy of Appendix B is available at www.fcc.gov.

(e) *Post-intermediate access code and subscriber 800 calls.* In the absence of a negotiated agreement to pay a different amount, each entity listed in Appendix C of the *Fifth Order on Reconsideration and Order on Remand* in CC Docket No. 96-128, FCC 02-292, must pay default compensation to payphone service providers for access code calls and payphone subscriber 800 calls for the period beginning April 21, 1999, in the amount listed in Appendix C for any payphone for any month during which per-call compensation for that payphone for that month was or is not paid by the listed entity. A complete copy of Appendix C is available at www.fcc.gov.

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47 C.F.R. § 64.1310 Payphone compensation payment procedures.

(a) It is the responsibility of the first facilities-based interexchange carrier to which a compensable coinless access code or subscriber toll-free payphone call is delivered by the local exchange carrier to track, or arrange for the tracking of, each such call so that it may accurately compute the compensation required by Sec. 64.1300(a). The first facilities-based interexchange carrier to which a

compensable coinless payphone call is delivered by the local exchange carrier must also send back to each payphone service provider at the time dial around compensation is due to be paid a statement in computer readable format indicating the toll-free and access code numbers that the LEC has delivered to the carrier, and the volume of calls for each toll-free and access number each carrier has received from each of that payphone service provider's payphones, unless the payphone service provider agrees to other arrangements.

(b) The first facilities-based interexchange carrier to which a compensable coinless payphone call is delivered by the local exchange carrier may obtain reimbursement from its reseller and debit card customers for the compensation amounts paid to payphone service providers for calls carried on their account and for the cost of tracking compensable calls. Facilities-based carriers and resellers may establish or continue any other arrangements that they have with payphone service providers for the billing and collection of compensation for calls subject to Sec. 64.1300(a), if the involved payphone service providers so agree.

(c) Local Exchange Carriers must provide to carriers required to pay compensation pursuant to Section 64.1300(a) a list of payphone numbers in their service areas. The list must be provided on a quarterly basis. Local Exchange Carriers must verify disputed numbers in a timely manner, and must maintain verification data for 18 months after close of the compensation period.

(d) Local Exchange Carriers must respond to all carrier requests for payphone number verification in

connection with the compensation requirements herein, even if such verification is a negative response.

(e) A payphone service provider that seeks compensation for payphones that are not included on the Local Exchange Carrier's list satisfies its obligation to provide alternative reasonable verification to a payor carrier if it provides to that carrier:

(1) A notarized affidavit attesting that each of the payphones for which the payphone service provider seeks compensation is a payphone that was in working order as of the last day of the compensation period; and

(2) Corroborating evidence that each such payphone is owned by the payphone service provider seeking compensation and was in working order on the last day of the compensation period. Corroborating evidence shall include, at a minimum, the telephone bill for the last month of the billing quarter indicating use of a line screening service.

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47 C.F.R. § 64.1320 Payphone compensation verification and reports.

(a) Carriers subject to payment of compensation pursuant to Section 64.1300(a) shall conduct an annual verification of calls routed to them that are subject to such compensation and file a report with the Chief, Common Carrier Bureau within 90 days of the end of the calendar year, provided, however, that such verification and report shall not be required for calls received after December 31, 1998.

(b) The annual verification required in this section shall list the total amount of compensation paid to payphone service providers for intrastate, interstate and international calls, the number of compensable calls received by the carrier and the number of payees.